



claimant Jamie Lobdell will be identified in this record as claimant. Respondent owner Jaime Mendoza will be identified as respondent.

Respondent is a general contractor in the construction trade. He does new and remodeling jobs, primarily constructing garages. Respondent owner generally employed seven to eight employees on his various jobs. Respondent regularly paid his workers in cash, withholding nothing from their checks. Respondent furnished the tools for the work, decided what jobs would be performed, told the workers when and where to work and supervised the results. Any hiring or firing decisions were made by respondent.

Claimant first worked for respondent in the summer of 2006. The exact start date is not contained in this record. Claimant initially worked jobs for respondent tearing out walls, removing old carpet and performing clean up on respondent's jobs. Claimant also worked a roofing job as an independent contractor where he and two other workers, Jeremy Buress and George Courtright (Jeremy's uncle), were paid a lump sum of \$1,000 to roof a garage. Respondent provided materials and tools for the jobs, although respondent did testify that a compressor and a nail gun may have been provided by one of the workers on one of the jobs. Respondent agreed that on most jobs, he supplied the tools.

On August 15, 2006, claimant was working on a garage on Gordon Street, when the ladder on which he was standing collapsed and claimant fell onto a concrete floor, breaking his left leg. The controversy arises because respondent denies that claimant was authorized to work that job on that day. Claimant had done work at that location, as the earlier sheetrock job and the trash hauling job were at that location. But respondent testified that claimant had done a poor job on the earlier projects, only showing up for work part of the time on the roofing job and taking too long on the carpeting job. Respondent stated he would not have used claimant on the siding job on Gordon Street due to his poor earlier work performances. Claimant, however, testified that he was told on the Friday before the date of accident that he would be working on the siding job on the Gordon Street job. In fact, claimant stated that he worked the Gordon Street siding job on the Saturday before the date of accident and would have worked the following Monday had it not been raining.

Both Jeremy Buress and James (Jimmy) Buress (Jeremy's brother) testified at the preliminary hearing. They agreed that claimant and the Buress brothers were to work the siding job at the Gordon Street location. Both testified that respondent told them the previous Friday of the work project and they worked the Gordon Street job on that previous Saturday.

Jimmy was present on the date of accident, but Jeremy was home sick that day. Jimmy agreed with claimant that respondent had met with them early on the morning of the accident and had given work instructions to the workers, including claimant. Respondent denies going to the job site that morning and testified he was at the city building when he

first received notice that claimant was injured. Claimant and Jimmy testified that respondent was in his truck sitting on the street in front of the Gordon Street location and was summoned immediately after claimant's fall.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>3</sup>

The primary test used by courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.<sup>4</sup>

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price;
2. The independent nature of the worker's business or distinct calling;
3. The employment of assistants and the right to supervise their activities;
4. The worker's obligation to furnish tools, supplies and materials;
5. The worker's right to control the progress of the work;

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<sup>1</sup> K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>4</sup> *Id.* at 102-103.

6. The length of time that the worker is employed;
7. Whether the worker is paid by time or by the job; and
8. Whether the work is part of the regular business of the employer.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.<sup>7</sup>

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”<sup>8</sup>

From this record, this Board Member has determined that, while claimant may have worked for respondent as an independent contractor on an occasion, the normal relationship between this claimant and respondent was that of employer-employee. Respondent arranged the jobs, which were clearly a part of his regular business. Respondent provided the materials and tools, determined when, where and how long the workers worked, paid by the hour on most jobs and had the power to hire and fire. This

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<sup>5</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

<sup>6</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>7</sup> K.S.A. 2006 Supp. 44-501(g).

<sup>8</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

Board Member, therefore, affirms the ALJ's finding that, more probably than not, the relationship of employer-employee existed on the date of accident.

This Board Member finds that claimant was present on the job site on the date of accident as an employee, and not as a volunteer. Claimant's testimony, along with that of the Buress brothers, is convincing. Claimant was approached the prior Friday, told of the job siding the garage on Gordon Street, and actually worked the job the previous Saturday. It is consistent with the greater weight of the testimony that respondent met with the workers, including claimant, on the morning of the accident and gave work instructions. It is not consistent with the greater weight of the credible testimony that respondent was unaware of claimant's presence on the job site the morning of the accident. This Board Member, therefore, finds that the preliminary hearing Order of the ALJ dated December 13, 2006, granting claimant benefits in this matter should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated December 13, 2006, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2007.

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BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant  
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge

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<sup>9</sup> K.S.A. 44-534a.